



Lecture : 04
Introduction

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1. Introduction

Lecture Outlines

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1. Overview

1.1 Introduction to Claim and Counterclaim:

- The construction contract is unique in that it seeks to provide for a specific remedy in the event of any breach of the terms and conditions within its framework and/or for a contractual entitlement in respect of specified events.
- The first step of the claims procedure of any construction contract is the making of a claim.
- Consequently, the definition and legal basis of claims and counterclaims, and the process by which they can be made and through which the parties' rights can be exercised or are protected, also need to be understood

2. Definition

2.1 Claim and Counterclaim background :

- In all construction contracts, claims and the right to claim play a significant role in the contractual relationship between the employer and the contractor
- Curiously, for such a fundamental aspect of the contract, no express definition appears in the typical standard form of construction contract and it is rare to find a definition of ‘a claim’ in reference texts or authorities on construction contracts.
- A claim is defined in “*The Oxford Companion to Law*” as a general term for the assertion of a right to money, property, or to a remedy.
- Strictly speaking then, whenever the contractor applies for his monthly interim payment the works, or the employer writes to the contractor requiring him to remedy defective work, it would be a claim under this definition.

2. Definition

2.2 Claim:

- In construction contracts, a claim is generally taken in practice to be an assertion for additional *monies* due to a party or *for extension of the Time for Completion*.
- This interpretation of ‘a claim’ is borne out by the wording of the contractual provisions relating to claims
 - If the Employer considers that the Employer is entitled to any additional payment from the Contractor (or reduction in the Contract Price) and/ or to an extension of the DNP (Defects Notification Period); {FIDIC Employer’s and Contractor’s Claims} Clause 20.1 (a)
 - If the Contractor considers that the Contractor is entitled to any additional payment from the Employer and/or to EOT(Extension of Time); {FIDIC Employer’s and Contractor’s Claims} Clause 20.1 (b)

2. Definition

2.3 Counterclaim:

- A counterclaim is defined as an assertion made by a respondent party which can conveniently be examined and disposed of in an action originally initiated by the claimant party.
- The concept of convenience referred to here signifies that the background of the counterclaim is similar to that of the claim and results from the same set of facts and events.
- It is not necessarily a defense, but a substantive claim against the claimant which could have grounded an independent action.
- For this reasons, both claims and counterclaims will be referred to as claims.

3. Claim Procedure

3.1. Notice of Claim {20.2.1}:

- The claiming Party shall give a Notice to The Engineer, describing the event or circumstance giving rise to the **cost, loss, delay** or **extension of DNP** for which the Claim is made as soon as practicable, and no later than 28 days after the claiming Party became aware, or should have become aware, of the event or circumstance
- If the claiming Party fails to give a Notice of Claim within this period of **28 days**, the claiming Party shall not be entitled to any **additional payment**, the **Contract Price shall not be reduced** (in the case of the Employer as the claiming Party), the **Time for Completion** (in the case of the Contractor as the claiming Party) or **the DNP** (in the case of the Employer as the claiming Party) shall not be extended, and the other Party shall be discharged from any liability in connection with the event or circumstance giving rise to the Claim.

3. Claim Procedure

3.2. Engineer's Initial Response {20.2.2}:

- If the Engineer considers that the claiming Party has failed to give the Notice of Claim within the period of 28 days under Sub-Clause 20.2.1 [Notice of Claim] the Engineer shall, within 14 days after receiving the Notice of Claim, give a Notice to the claiming Party accordingly (with reasons).
- If the Engineer does not give such a Notice within this period of 14 days, the Notice of Claim shall be deemed to be a valid Notice.
- If the other Party disagrees with such deemed valid Notice of Claim the other Party shall give a Notice to the Engineer which shall include details of the disagreement.
- Thereafter, the agreement or determination of the Claim under Sub-Clause 20.2.5 [Agreement or determination of the Claim] shall include a review by the Engineer of such disagreement.

3. Claim Procedure

3.3. Contemporary Record {20.2.3}:

- “Contemporary Records” means records that are prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim.
- The claiming Party shall keep such contemporary records as may be necessary to substantiate the Claim.
- Without admitting the Employer’s liability, the Engineer may monitor the Contractor’s contemporary records and/or instruct the Contractor to keep additional contemporary records.
- The Contractor shall permit the Engineer to inspect all these records during normal working hours (or at other times agreed by the Contractor), and shall if instructed submit copies to the Engineer.
- Such monitoring, inspection or instruction (if any) by the Engineer shall not imply acceptance of the accuracy or completeness of the Contractor’s contemporary records.

3. Claim Procedure

3.4. Fully detailed Claim {20.2.4}:

- “Fully Detailed Claim” means a submission which includes:
 - a) a detailed description of the event or circumstance giving rise to the Claim;
 - b) a statement of the contractual and/or other legal basis of the Claim;
 - c) all contemporary records on which the claiming Party relies; and
 - d) detailed supporting particulars of the amount of additional payment claimed (or amount of reduction of the Contract Price in the case of the Employer as the claiming Party), and/or EOT claimed (in the case of the Contractor) or extension of the DNP claimed (in the case of the Employer).

3. Claim Procedure

3.4. Fully detailed Claim,{20.2.4}(Cont):

- If within this time limit the claiming Party fails to submit the statement under sub-paragraph (b) above, the Notice of Claim shall be deemed to have lapsed, it shall no longer be considered as a valid Notice, and the Engineer shall, within 14 days after this time limit has expired, give a Notice to the claiming Party accordingly.
- If the Engineer does not give such a Notice within this period of 14 days, the Notice of Claim shall be deemed to be a valid Notice. If the other Party disagrees with such deemed valid Notice of Claim the other Party shall give a Notice to the Engineer which shall include details of the disagreement. Thereafter, the agreement or determination of the Claim under Sub-Clause 20.2.5 [Agreement or determination of the Claim] shall include a review by the Engineer of such disagreement.

3. Claim Procedure

3.4. Fully detailed Claim,{20.2.4}(Cont):

- If the claiming Party receives a Notice from the Engineer under this Sub-Clause 20.2.4 and if the claiming Party disagrees with such Notice or considers there are circumstances which justify late submission of the statement under sub-paragraph (b) above, the fully detailed claim shall include details of the claiming Party's disagreement or why such late submission is justified (as the case may be)

3. Claim Procedure

3.5. Agreement or determination:

- After receiving a fully detailed Claim the Engineer shall proceed under Sub-Clause 3.7 [Agreement or Determination] to agree or determine.
- The Engineer shall consult with both Parties jointly and/or separately, and shall encourage discussion between the Parties in an endeavor to reach agreement. {3.7}
- The Engineer shall commence such consultation promptly to allow adequate time to comply with the time limit for agreement under Sub-Clause 3.7.3 [42 days]. {3.7}
- Unless otherwise proposed by the Engineer and agreed by both Parties, the Engineer shall provide both Parties with a record of the consultation. {3.7}
- If agreement is achieved, the Engineer shall give a Notice to both Parties of the agreement, which agreement shall be signed by both Parties and shall include a copy of the agreement. {3.7}

3. Claim Procedure

3.5. Agreement or determination (Cont:):

If

- No agreement is achieved within the time limit for agreement under Sub-Clause 3.7.3 [Time limits];

Or

- both Parties advise the Engineer that no agreement can be achieved within this time limit whichever is the earlier,
- the Engineer shall give a Notice to the Parties accordingly and shall immediately proceed as specified under Sub-Clause 3.7.2 [Engineer's Determination].

3. Claim Procedure

3.5. Engineers Determination:

- The Engineer shall make a fair determination of the matter or Claim, in accordance with the Contract, taking due regard of all relevant circumstances.
- Within the time limit for determination under Sub-Clause 3.7.3 [42 days], the Engineer shall give a Notice to both Parties of his/her determination.
- This Notice shall state that it is a “Notice of the Engineer’s Determination”, and shall describe the determination in detail with reasons and detailed supporting particulars, within **42 days** or within such other time limit as may be proposed by the Engineer and agreed by both Parties.

3. Claim Procedure

3.6. Dissatisfaction with the Engineers Determination:

- If either Party is dissatisfied with a determination of the Engineer:
 - a. The dissatisfied Party may give a **NOD** to the other Party, with a copy to the Engineer;
 - b. This **NOD** shall state that it is a “**Notice of Dissatisfaction** with the Engineer’s Determination” and shall set out the reason(s) for dissatisfaction;
 - c. This **NOD** shall be given within **28 days** after receiving the Engineer’s Notice of the determination under Sub-Clause 3.7.2 [Engineer’s Determination] and
 - d. *Thereafter, either Party may proceed under Sub-Clause 21.4 [Obtaining DAAB’s Decision].*
- If no **NOD** is given by either Party within the period of **28 days** stated in sub-paragraph (c) above, the determination of the Engineer shall be deemed to have been accepted by both Parties and shall be final and binding on them.

4. Dispute

4.1. Definition:

A dispute is said to come into being when (Either Party) the contractor did not accept the engineer's rejection of his claim.

THANKS